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OFFICE OF THE SECRETARY  
FEDERAL MARITIME COMM

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**IN THE MATTER OF THE PETITIONS OF UNITED PARCEL SERVICE, INC. (P3-03),  
THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF  
AMERICA, INC. (P5-03), OCEAN WORLD LINES, INC. (P7-03), BAX GLOBAL INC.  
(P8-03) AND C.H. ROBINSON WORLDWIDE, INC. (P9-03)**

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**FURTHER COMMENTS OF THE WORLD SHIPPING COUNCIL  
IN FEDERAL MARITIME COMMISSION  
DOCKET NOS. P3-03, P5-03, P7-03, P8-03 AND P9-03**

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The World Shipping Council ("Council") submits these additional comments in response to the Commission's November 13, 2003, Notice extending the comment period in the above-referenced proceedings until January 16, 2004. The interest of the Council in these proceedings has been set forth in prior filings. The Council will not reiterate here the comments already submitted, but wishes only to provide these brief supplemental observations.

**I. The Record In The Proceedings To Date**

The Council has reviewed the petitions, comments, and memoranda of meetings in the above-referenced dockets. Taking this record as a whole, there are three points that stand out:

1. There is no factual record illuminating how NVOCCs presently operate and how, if at all, the tariff requirements negatively impact them. In fact, there are a number of significant inconsistencies in the record.

2. Petitioners have offered inconsistent proposals as remedies for differing alleged difficulties with the existing tariff publication and service contracting requirements.

3. The Commission is being requested to consider making diverse, significant alterations to the existing regulatory system, and no consensus exists in the proposals or comments that have been submitted. The Commission would need an adequate factual record and a careful review of the issues and potential forms of relief in order to identify and evaluate what, if any, action might be appropriate. The Commission should determine an appropriate way to focus the inquiry into and consideration of the issues.

We briefly explain these three points below.

A. *A Factual Record is Lacking.*

A striking aspect of the record is the absence of facts. While petitioners' claims are sweeping, they are exceedingly general. There are few facts supporting these claims. Perhaps most important, there is little explanation of how the NVOCCs seeking regulatory change presently do business under the existing rules, or how the existing rules impair their ability to conduct their business. For example:

1. Petitioners offer virtually no specific facts as to how they operate. Do they offer or sign contracts? If so, how do these differ from service contracts? What is the relationship, if any, between such contracts and NVOCC tariffs? What services are covered by the tariff? By the contracts? Does it make any difference? Are the burdens less if the terms are in the contracts? In the tariffs?

2. There are no examples of how the present tariff requirements harm NVOCCs. There are no estimates or examples of lost business, generally or **specifically**. There is no indication that the tariff requirements deter NVOCCs' customers from using NVOCCs.

The Commission needs to inform itself of the essential facts. Absent an understanding of the facts, the Commission cannot conduct a reasoned analysis or construct possible regulatory approaches to the issues raised.

*B. Petitioners Do Not Agree on the Nature of the Problem or the Nature of a Proposed Remedy.*

1. Nature of the Problem

The record in these proceedings reveals that there is no consensus among the petitioners on the nature of the problem for which relief is being sought. For example, the Council has identified at least four areas in which petitioners allege different and often conflicting problems:

(i) Alleged Lack of Confidentiality: Some petitioners say the lack of confidentiality of their ocean tariff rates is the problem (United Parcel Service, Inc. ("UPS"), BAX Global Inc. ("BAX") and Ocean World Lines, Inc. ("OWL")). Other petitioners claim that the ocean tariff rate is meaningless either because it is an arbitrary number backed out from a package of negotiated rates and services or because no one looks at NVOCC tariff rates, i.e., they are already de facto confidential (e.g., National Customs Brokers & Forwarders Association of America, Inc. ("NCBFAA")). NVOCC ocean rates are, therefore, variously described as public, de facto confidential, meaningless, or of no interest to shippers or carriers.

(ii) Alleged Lack of Flexibility: Some petitioners claim that their problem is lack of flexibility under tariffs (UPS and C.H. Robinson Worldwide, Inc. (“CHRW”)). Yet, some of these same petitioners note that the NVOCC business has flourished and grown, with significant numbers of new NVOCC entrants, added NVOCC services, and huge NVOCC investments. This raises the question of whether the lack of flexibility is real, since all of this quantitative and qualitative NVOCC growth has occurred precisely during the period when NVOCCs were supposedly hampered by tariff publication requirements.

(iii) Alleged Burden of Tariff Publication: Some petitioners claim that the issue is the burden of publishing tariffs (e.g., UPS, BAX, NCBFAA). Yet, this tariff obligation has been in effect since 1984, and was considerably more burdensome prior to OSRA. Other petitioners (OWL, CHRW) make no mention of burden. No petitioner has sought to quantify the burden.

(iv) Alleged Exposure to Penalties: Some petitioners express concern that tariff prohibitions expose them to Shipping Act penalties (NCBFAA). Others make no mention of penalties and indeed argue that historical compliance with the Act **should** be a prerequisite for any NVOCC exemption (UPS, BAX, OWL).

## 2. Relief Requested

Since there is lack of agreement by petitioners on the nature of the problem, there is, quite logically and not surprisingly, a substantial gulf among petitioners on an appropriate remedy.

(i) Some petitioners argue that some subset of NVOCCs should be able to offer service contracts (e.g., UPS, BAX); some petitioners want relief from alleged

tariff burdens (NCBFAA); some petitioners propose allowing the publication of range rates (NCBFAA, NVO-GAC, NY/NJ FFA); some would amend the freight forwarder regulations (OWL); some petitioners urge they be freed of Section 10 Shipping Act obligations (NCBFAA); others would submit to enforcement obligations (UPS, BAX).

(ii) Some petitioners urge that the Commission should change its regulations for certain NVOCCs based on the size or other characteristics of the specific NVOCC, but fail to provide the Commission with either adequate justification or specific or implementable criteria for this delineation (UPS, BAX, CHRW), while others urge relief on an industry-wide basis without standards or criteria (NCBFAA, OWL).

(iii) In addition to advocating their own positions, some petitioners either support or attack the other proposals, further confusing what the problems, issues and appropriate resolution might be.

*C. The Petitions Seek Substantial Alteration of the Existing Regulatory System and Thus Require Strong Justification.*

Various proposals for relief, from the use of range rates, to the elimination of tariff-filing requirements, to the creation of a new form of contract, to the authorization of service contracting by a limited class of NVOCCs, have been offered in the petitions under consideration. Most of these suggestions contemplate significant changes in how the Commission regulates liner shipping under the Shipping Act of 1984, as well as major changes in the way the Commission itself would perform its oversight responsibilities. Some involve questions of statutory authority and some raise important policy issues. In short, the petitions ask the Commission to make judgments and take actions that require an adequate factual record, clear rationales

and a strong justification. See, e.g., *Petition for Exemption From the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984*, Order Denying Petition, 26 S.R.R. 240, 246 (F.M.C. May 1, 1992) (denying petition seeking exemption from NVOCC tariff filing requirements because “[t]he Petition raises a large number of issues of fact that cannot be adequately resolved in the record of this proceeding and as a result, the relief requested cannot be granted.”).

## **II. Range Rates – A Further Comment**

The December 19, 2003, filing of the NVOCC-Government Affairs Conference and the New York/New Jersey Foreign Freight Forwarders Association (the “Associations”) further underscores the wide gulf within the NVOCC community. The Associations say their first choice is an exemption from tariff filing, but spend 90% of their comments on “range rates.” They suggest, without an explanatory rationale, that a range of 50% be adopted. They then dedicate the bulk of their comments to a proposal — heretofore not mentioned in this proceeding — to amend the rules governing time-volume rates (“TVRs”). The Associations in effect propose to eliminate the *sine qua non* of TVRs — no amendments after enrollment, no liquidated damages — in redefining TVRs as **unfiled** contracts with few regulatory obligations.

In its prior filing, the Council stated that it had no objection to the Commission considering a rulemaking on range rates, but cautioned that such an approach would raise a number of significant issues that need to be addressed. The comments of the Associations begin the consideration of this approach, but illustrate the numerous and complex issues that require careful consideration.

### **III. Conclusion - The Way Forward**

In view of the wide differences among petitioners, the dearth of facts, and the lack of specificity, it is necessary for the Commission to bring greater focus to the discussion and analysis of the issues raised. The present record is too broad and too general to provide a workable framework for an effective analysis. Whatever procedure the Commission employs going forward, it must be one under which the essential facts can be developed and the options and issues can be defined and limited. For example, it may be useful for the Commission to develop a list of specific questions, the answers to which would help the Commission to do the following:

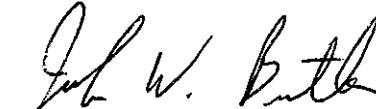
1. Clarify and document the alleged problems with current tariff publication requirements for NVOCCs;
2. Assess the full range of potential forms of relief available to the Commission for addressing any significant problems that may be shown to exist;
3. Develop and justify the standards or criteria applicable to particular forms of relief contemplated, if any; and
4. Determine and evaluate the likely policy and commercial consequences of any Commission action that would significantly change the existing regulatory system.

The information and analyses offered in response to such questions should allow the Commission to decide which issues and remedies it wants or does not want to consider, and the legal or policy reasons supporting those choices. Absent this, the parties will likely continue to advocate views so diverse that they will provide scant assistance to the Commission's decision-making process.

Respectfully submitted,

WORLD SHIPPING COUNCIL

By Its Attorneys:

A handwritten signature in cursive script, appearing to read "John W. Butler", is written over a horizontal line.

~~Stanley O. Sher~~  
John W. Butler  
Sher & Blackwell LLP  
1850 M Street, N.W.  
Suite 900  
Washington, DC 20036  
(202) 463-2500

Christopher Koch  
President & CEO  
World Shipping Council  
1015 15th Street, N.W.  
Suite 450  
Washington, D.C. 20005  
(202) 589-1230

January 16, 2004



CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2004, I have served the foregoing Further Comments of the World Shipping Council in FMC Dockets No. P3-03, P5-03, P7-03, P8-03 and P9-03 by first-class mail on the following parties.

J. Michael Cavanaugh, Esq.  
Holland & Knight LLP  
2099 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

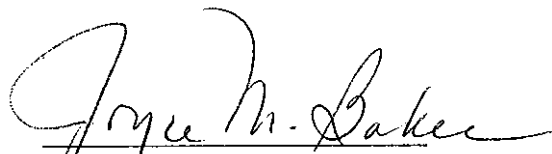
Charles L. Coleman, III, Esq.  
Holland & Knight LLP  
50 California Street, Suite 2800  
San Francisco, California 94111

Edward D. Greenberg, Esq.  
David K. Monroe, Esq.  
Galland Kharasch Greenberg  
Fellman & Swirsky, P.C.  
1054 Thirty-First Street, N.W.  
Washington, D.C. 20037-4492

Leonard L. Fleisig, Esq.  
Troutman Sanders LLP  
401 9<sup>th</sup> Street, N.W., Suite 1000  
Washington, D.C. 20004

Edward J. Sheppard, Esq.  
Richard K. Bank, Esq.  
Ashley W. Craig, Esq.  
Suzanne L. Montgomery, Esq.  
Thompson Coburn LLP  
1909 K Street, N.W., Suite 600  
Washington, D.C. 20006

Carlos Rodriguez, Esq.  
Rodriguez O'Donnell, Ross  
Fuerst, Gonzalez & Williams  
1211 Connecticut Avenue, N.W., Suite 800  
Washington, D.C. 20036

  
Joyce M. Baker